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CHRISTOPHER A. PRINE
Clerk

May 29, 2018

VIA ELECTRONIC FILING

Christopher A. Prine
Clerk, Fourteenth Court of Appeals
301 Fannin, Suite 245
Houston, Texas 77002

Re: Marc Wakefield Dunham v. State
Court of Appeals No. 14-17-00098-CR
Trial Court Case No. 2109329

Dear Mr. Prine:

The Court submitted this case to a panel consisting of Justices Boyce, Donovan, and Wise after hearing argument on February 14, 2018. I write this letter pursuant to Texas Rules of Appellate Procedure 2 and 38.7 and respectfully request that the Court grant leave to file it as a post-submission letter brief.

The parties cited to O'Brien v. State, 482 S.W.3d 593 (Tex. App.—Houston [1st Dist.] 2015, pet. granted), in their briefing and discussed it during oral argument. I write to advise the Court that the Court of Criminal Appeals recently decided O'Brien. O'Brien v. State, ___ S.W.3d ___, No. PD-0061-16 (Tex. Crim. App. May 2, 2018).

The Court of Criminal Appeals held that jury unanimity is not required with respect to the enumerated offenses of theft and money laundering in an engaging in organized criminal activity by commission jury charge. The basis for that decision was the Court's conclusion that the gravamen of the offense of engaging in organized criminal activity is a "circumstance surrounding the conduct," namely the existence or creation of a combination that collaborates in carrying on criminal activities. Slip Op. at 37. Thus, the Legislature intended that the underlying predicate offenses be treated as alternative manner and means of committing a single offense of engaging in organized criminal activity. Id.

By contrast, for the reasons discussed in appellant's briefing and during oral argument, the gravamen of the offense of deceptive business practice is the nature of the defendant's conduct. Appellant's Brief at 24-25. The 12 different types of enumerated deceptive conduct are the essence of the offense. If the gravamen of the crime is the "nature of conduct," the jury must be unanimous about the specific criminal act committed. See O'Brien, Slip Op. at 11; Young v. State, 341 S.W.3d 417, 424 (Tex. Crim. App. 2011); Pizzo v. State, 235 S.W.3d 711, 717 (Tex. Crim. App. 2007). Accordingly, the Court of Criminal Appeals' decision in O'Brien is not inconsistent with appellant's assertion that the trial court erred in refusing to instruct the jury in the charge that it must agree unanimously that appellant committed the same specific act of deceptive business practice, and in authorizing it to convict him even if it did not agree unanimously on which specific act he committed.

I appreciate your bringing this letter to the Court's attention.

Sincerely,

/s/ Josh Schaffer

Josh Schaffer

JS/

cc: Katie Davis